2016

# John Da Yid Ingles, Plaintiff/ Appellant, vs. Larry Leon Woodrum and Loretta Wood Woodrum, Defendants/ Appellees.

Utah Court of Appeals

UTAH COURT OF APPEALS

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| JOHN DAVID INGLES,<br><br>Plaintiff/Appellant<br><br>vs.<br><br>LARRY LEON WOODRUM and LORETTA WOOD WOODRUM ,<br><br>Defendants/Appellees. | **BRIEF OF THE APPELLEES**<br><br>Appellate Case No.: 20150814-CA |

# BRIEF OF THE APPELLEES

## ON APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT


Wesley D. Hutchins (#6576)
THE HUTCHINS LAW FIRM, P.C.
*Attorney for Appellant John David Ingles*
6751 South Adventure Way
West Jordan, Utah 84081
Telephone: (801) 870 9126
Fax: (801) 618-4251
E-mail: wes@thehutchinslawfirm.com

David R. Ward
Autumn C. Begay
*Attorneys for Defendants/Appellees Larry Leon Woodrum and Loretta Wood Woodrum*
4543 South 700 East, Suite 200
Salt Lake City, Utah 84107
Telephone: (801) 268-9868
Email: dward@cyclingutah.com

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## QUESTION PRESENTED

Under Utah law, did the trial court correctly grant summary dismissal and conclude as a matter of law that Plaintiff/Appellant John David Ingles' (hereinafter "Plaintiff") Complaint failed to state a claim upon which relief could be granted where (1) Plaintiff's non-conclusory allegations in his Complaint, even if taken as true, do not establish acts attributable to Defendants sufficient to support a claim for alienation of affection, (2) Plaintiff's claim for negligent interference with the marital relationship is unsupported by Utah law, (3) Plaintiff's allegations in his Complaint, even if taken as true, are not of the nature or degree supporting recovery in an action for intentional infliction of emotional distress, and (4) Plaintiff's allegations in his Complaint are insufficient to establish that the Defendants' conduct constituted negligence of the type likely to cause severe and unmanageable mental distress in a reasonable person normally constituted.

## STATEMENT OF THE ISSUES

Pursuant to Rule 24 of the Utah Rules of Appellate Procedure, Appellees Larry Leon Woodrum and Loretta Wood Woodrum (hereinafter "Defendants") need not provide a statement of the issues or of the case unless the Defendants are dissatisfied with the statement of the Plaintiff.

However, Defendants disagree that Issue #1 as set forth by Plaintiff is an issue herein. Plaintiff's Complaint was dismissed on a Rule 12(b)(6) motion to dismiss, not a motion for summary judgment; therefore, there is no need to discuss whether or not there were disputed material facts. *See Mounteer v. Utah Power & Light. Co.*, 823 P.1055, 1058 (Utah 1991).

Defendants also disagree that Issue #3 as set forth by Plaintiff is complete. Plaintiff's cause of action in the district court was not merely one for negligence but one for negligently interfering in the marital relationship of Plaintiff and Lorelee Woodrum Ingles (hereinafter "Spouse"), a cause of action which does not exist in Utah law.

Plaintiff also sets forth what he believes to be the determinative law in these areas. Rule 24(a) of the Utah Rules of Appellate Procedure make no request for a statement of the determinative law. Although Defendants disagree with some of Plaintiff's claimed "determinative" law, Defendants do not address those disagreements here, but put forth what they understand the "determinative" law to be in their argument. (R. 24.)

## JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

There are no statutory or constitutional provisions relevant to this appeal.

## STATEMENT OF THE CASE

This case concerns a disgruntled former son-in-law (Plaintiff) who, after he filed for divorce from Spouse, filed with the Third District Court, in Case No. 140907351, claims for alienation of affection, negligent interference with the marital relationship, intentional infliction of emotional distress, and negligent infliction of emotional distress against his former mother-in-law and father-in-law (Defendants). (R. 1-28.) Defendants filed a Motion to Dismiss for failure to state a claim upon which relief may be granted. (R. 30-31.) After a full briefing, the district court entered its Ruling and Order, dismissing each of Plaintiff's claims for failure to state a

claim and granting the Defendants' Motion to Dismiss. (R. 377- 381). Plaintiff now appeals the district court's ruling.

As this case concerns the sufficiency of Plaintiff's pleaded allegations as set forth in his Complaint, Appellees defer to the allegations in the Complaint itself. Instead of an unnecessary and repetitious lengthy reiteration of those facts herein, Defendants direct this Court to the Complaint as set forth in the Record (R. 1-26.) and attached as Addendum C to Plaintiff's Brief. In his Brief and in his Objection to Defendants' Motion to Dismiss, Plaintiff has incorporated allegations not present in the Complaint. Any and all additional allegations, not already present in the Complaint are excluded from Defendants' recitation of the facts has they are extraneous to the Complaint and an analysis of the sufficiency of a complaint is confined to the allegations within the pleading itself.

## SUMMARY OF ARGUMENTS

A Motion to Dismiss challenges the sufficiency of a complaint in stating a claim upon which relief may be granted, thus the analysis of whether a complaint is sufficient is confined to the allegations within the pleading itself. The trial court appropriately refused to consider any allegations outside of those in the Complaint. Plaintiff has attempted to bolster the sufficiency of his Complaint once again by including allegations in his Brief which were not presented in his original Complaint. As this Court is reviewing a Rule 12(b)(6) Motion to Dismiss, any allegations outside of the Complaint should not be considered. As the district court chose not to consider any allegations or exhibits outside of the Complaint, it also appropriately chose not to, on its own initiative, convert the Motion to Dismiss into a Motion for Summary Judgment.

Although the court must accept all factual allegations in the complaint as true when considering a motion to dismiss, the sufficiency of a complaint must be determined by the facts pleaded rather than the conclusions stated. As set forth, Plaintiff's Complaint is made up of primarily vague, unrelated and/or unsupported conclusory allegations, without specific facts to support these conclusions. While numerous conclusory allegations are made, the facts specifically alleged are insufficient to support a claim for alienation of affection, negligence, intentional infliction of emotional distress, or negligent infliction of emotional distress.

Plaintiff failed to assert facts in his Complaint which show Defendants willfully and intentionally alienated Spouse's affections for Plaintiff resulting in the loss of Spouse's consortium. Furthermore, even if Plaintiff had sufficiently alleged facts showing an intention on Defendants' part to alienate wife's affections resulting in the loss of contortion, such acts were not the controlling cause of the dissolution of the marriage, but merely one aspect of many other causes and factors within the marriage which, when combined, easily outweigh any alleged conduct on Defendants' part. As such, the district court's dismissal of Plaintiff's claim for alienation of affection should be affirmed.

Plaintiff, while entitling his claim as one for negligence, asserts that Defendants negligently interfered with the marital relationship of Plaintiff and Spouse. No such cause of action exists under Utah law and Plaintiff cites to no legal authority supporting such a claim. As such, the district court's dismissal of Plaintiff's claim for negligence should be affirmed.

Plaintiff's alleged non-conclusory facts in his Complaint, even if taken as true, fail to demonstrate that Defendants intentionally engaged in conduct toward the Plaintiff that was

outrageous or intolerable or of the nature or degree supporting recovery in a an action for intentional infliction of emotional distress. Furthermore, Plaintiff fails to state any specific form of extreme emotional distress. As such, the district court's dismissal of Plaintiff's claim for intentional infliction of emotional distress should be affirmed.

Plaintiff fails to allege in his Complaint any symptoms of severe physical or mental manifestations of emotional distress. Instead, Plaintiff's facts, as pled, are bare allegations of emotional distress without sufficient factual examples evidencing severe emotional distress. As such, the district court's dismissal of Plaintiff's claim for negligent infliction of emotional distress should be affirmed.

In light of Plaintiffs failure to state any claim upon which relief can be granted, this Court should affirm the district court's grant of dismissal of all Plaintiff's claims and award Defendants their reasonable attorney fees and costs.

## STANDARD OF REVIEW

The Appellate Court "review[s] a decision granting a motion to dismiss for correctness, granting no deference to the decision of the district court." *Scott v. Utah Cnty.*, 2015 UT 64, ¶ 13. In considering a motion to dismiss, the Court must construe the claim in the light most favorable to the Plaintiff and make all reasonable inference in Plaintiff's favor. *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991). Although the court must accept all factual allegations in the complaint as true, the sufficiency of a complaint "must be determined by the facts pleaded rather than the conclusions stated." *Franco v. Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 26, 21 P.3d 198 (quoting *Ellefsen v. Roberts*, 526 P.2d 912, 915 (Utah

1974)) . "Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." *Chapman By Through Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989).

"Under a rule 12(b)(6) dismissal, [the court's] inquiry is concerned solely with 'the sufficiency of the pleadings, [and] not the underlying merits of [the] case.'" *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997).

## ARGUMENT

### I. The District Court Appropriately Refused to Consider Allegations Outside of Plaintiff's Complaint and this Court Should Not Consider Allegations Outside of Plaintiff's Complaint.

A Motion to Dismiss challenges the sufficiency of a complaint in stating a claim upon which relief may be granted, thus the analysis of whether a complaint is sufficient is confined to the allegations within the pleading itself. UTAH R. CIV. P. 12(b). *Also see, Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997). Defendants filed a Motion to Dismiss Plaintiff's Complaint for failing to sufficiently state a claim upon which relief may be granted. In response, Plaintiff filed a "Verified Opposition" with numerous exhibits and sub-exhibits in an attempt to bolster the allegations within the Complaint. (R. 43-355.) Such attempt was inappropriate where a motion to dismiss rests entirely on whether the facts as alleged by Plaintiff in his complaint sufficiently state a claim upon which relief may be granted. Thus, the trial court appropriately refused to consider any allegations outside of those in the Complaint. (R. 377.)

Once again, Plaintiff has attempted to bolster the sufficiency of his Complaint by

including in his Brief a Statement of "Additional Relevant Facts". (Appellant's Brief, pp. 8-24 ) Anything outside of the allegations within the original Complaint should not be considered.

**II. The District Court Appropriately Refused to Convert the Motion to Dismiss into a Motion for Summary Judgment.**

Plaintiff argues that the trial court should have converted the motion to dismiss to one for summary judgment. (Appellant's Brief, p. 28). While it is true that when a motion to dismiss is accompanied by affidavits[1] it may be treated as a motion for summary judgment, a "court **should not** on [its] own initiative try to convert a motion for dismissal into one for summary judgment." *Hill v. Grant Central, Inc.*, 25 Utah 2d 121, 123, 477 P.2d 150, 151 (1970)(emphasis added). Thus, the district court's decision not to consider the extraneous exhibits, declarations, and other alleged evidence effectively converting the Motion to Dismiss into a Motion for Summary Judgment on its own initiative was appropriate and should be affirmed. (R. 377.)

**III. The District Court Correctly Dismissed Plaintiff's Claim for Alienation of Affection.**

The essence of the tort of alienation of affection "is the protection of the love, society, companionship, and comfort that form the foundation of a marriage and give rise to the unique bonding that occurs in a successful marriage." *Norton v. Macfarlane*, 818 P.2d 8, 12 (Utah 1991). To state a claim for alienation of affection, a plaintiff must plead with clear and

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[1]Even where affidavits and other documents outside the pleadings are submitted, such submission is not a basis for conversion to summary judgement. *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 14, 104 P.3d 1226, 1232 (citing *Lybrook v. Members of Farmington Mun. Scho. Bd of Educa.*, 232 F.3d 1334, 1342 ( 10th Cir. 2000).

convincing evidence (*Heiner v. Simpson*, 2001 UT 39, n. 2, 23 P.3d 1041): (a) [t]he fact of marriage, (b) that the defendant wilfully and intentionally, (c) alienated the wife's affections, (d) resulting in the loss of the comfort, society and consortium of the wife, and (e) (to justify punitive damages) a charge of malice." *Wilson v. Oldroyd*, 267 P.2s 759, 763 (Utah 1954). Furthermore, Plaintiff must prove that the Defendants' conduct constituted "the *controlling cause* of the alienation of affections" meaning that the "[d]efendant's conduct must have outweighed the combined effect of all other causes, including the conduct of the plaintiff spouse and the alienated spouse." *Heiner v. Simpson*, 2001 UT 39, n. 2, 23 P.3d 1041 (citing *Nelson v. Jacob*, 669 P.2d 1207, 1219 (Utah 1983)). In *Nelson v. Jacobsen*, the Utah Supreme Court described the type of affection that must have existed in the marriage in order for an alienation of affection claim to be sustained, stating Plaintiff must show that the wife "and her husband were happily married and that a genuine love and affection existed between them" and "that the love and affection so existing was alienated and destroyed." 669 P.2d 1207, 1218 (1983). Plaintiff failed to allege with sufficient specificity facts supporting several required elements to sustain a cause of action for alienation of affection.

A husband's claim to his wife's affections only exists while the parties are married. In addition, an actual genuine love and affection must have existed between the parties in order for it to have ever been destroyed. In his Complaint, Plaintiff states that Plaintiff and Spouse were married on June 26, 1998. Plaintiff petitioned for divorce and received a default decree of divorce on March 4, 2013. (R. 2.) At no place in his Complaint does Plaintiff allege facts of a genuine love and affection existing between him and Spouse. If anything, his facts appear to

state that there was no love in the relationship for the Defendants to cause to be alienated. Plaintiff states that during his affair with another woman during the marriage, Plaintiff found "many aspects of love, companionship, and intimacy with N.B. which he longed for *and rarely ever enjoyed* in his Marriage to [Spouse]." (R. 2). (emphasis added). Furthermore, a vast majority of Plaintiff's factual allegations are without date or time period. Plaintiff obtained a default divorce in March, 2013 and yet he continued to reside in the marital home and to continue to have a relationship with Spouse for nearly 6 months after he filed for and obtained the default divorce. (R. 2, 11.) These undated allegations may have just as well occurred in this six month period after the divorce, and thus the culmination of the injury, if any loving relationship actually existed, would have occurred when the marriage no longer existed.

Plaintiff fails to sufficiently support his claim that the Defendants acted wilfully and intentionally to alienate Spouse's affections. The only non-conclusory facts Plaintiff asserts relevant to this cause of action are that Defendant Loretta Wood Woodrum allegedly stated at the wedding festivities: "I don't approve of [the marriage] and will do all I can to make sure it doesn't last long." (R. 3.) Plaintiff also claims that after his affair, Defendant Loretta Wood Woodrum allegedly stated to Spouse that Spouse was 'stupid for staying with [Plaintiff]' and insisting that she needed to get a divorce from him." (R. 18.) Instead of specific factual allegations that Defendants wilfully and intentionally alienated the wife's affections, Plaintiff makes conclusory allegations that the Defendants engaged in manipulation and a "spirit of alienation." Plaintiff supports these conclusions with the allegations of Defendants asking Spouse to travel to Salt Lake City to look for a house, (R. 9.); Defendants pressuring Spouse to

go on a trip to California when Plaintiff and Spouse were to meet with their spiritual advisor, (R. 6.); Defendant sending text messages to family, friends, and church members telling them of Plaintiff's extramarital affair, (R. 12.); and Defendants accusing Plaintiff of stealing money from the home safe, (R. 18.). These allegations of fact, even taken as true, do not sufficiently support Plaintiff's claim for alienation of affection against Defendants because Plaintiff has not asserted facts showing Defendants willfully alienated Spouse's affections for Plaintiff resulting in the loss of consortium. *See Franco v. The Church of Jesus Christ of Latter-Day Saints*, 2001 UT 25, ¶ 26, 21 P.3d 198.

Plaintiff fails to sufficiently support his claim that defendant's alleged actions were **the** controlling cause of the dissolution of the Marriage, so much so that it completely outweighed the combined effect of *all other* causes, including the conduct of the plaintiff spouse and the alienated spouse. Many of Plaintiff's averments indicate issues with or choices of Spouse rather than with the Defendants. Plaintiff asserts that Spouse never became a successfully independent adult or wife, (R. 4.); has unresolved issues from childhood, (R. 5, 13.); chose not to move into the home in Henderson, NV, (R. 5.); discontinued couples therapy, (R.7.); went years without having sexual relations with Plaintiff, (R.7.); chose to move in with Defendants to help them settle into their new house, (R. 9.); chose to remain in the Defendants' home, (R. 11.); told the children that Plaintiff and Spouse cannot speak directly with one another because Plaintiff is 'mean," (R. 13.); took Defendants to appointments, prepared them meals, and took care of them, (R. 8, 16.); joined Defendants for vacations, holidays and Sunday dinners, (R. 18, 19.).

Furthermore, Plaintiff admits to a host of alleged facts of his own behavior which

estranged the parties from each other including that he chose to stay away from Spouse because of the side effects of her alleged bulimia, (R. 13.), that he spent the vast majority of his time apart from Spouse, (R. 3.), that he had an affair with a woman in California in which he fulfilled his needs for love, companionship, and intimacy, (R. 7.); that he frequently disagreed with his Spouse on how to raise their children, (R. 14.); and that he chose to live in the basement away from the family (R. 10.). These are a host of circumstances and conduct on behalf of Plaintiff that most certainly contributed to the marital discord and, taken together as true, overwhelm the alleged conduct by Defendants.

Plaintiff fails on several points to sufficiently state a claim for alienation of affection. Plaintiff fails to sufficiently state facts showing Defendants willfully alienated Spouse's affections resulting in the loss of consortium, that Defendants' actions were the primary controlling cause, or even that there was a loving relationship between the parties. Therefore, the district court's judgment dismissing Complaint for failing to sufficiently state a claim for alienation of affection should be affirmed.

## IV. The District Court Correctly Dismissed Plaintiff's Claim for Negligence.

To state a claim of negligence generally, Plaintiff must establish: "(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." *Callister v. Snowbird Corp.*, 2014 UT App 243, ¶ 11, 337 P.3d 1044, 1048 *cert. Denied sub nom. Callister v. Snowbird*, 343 P.3d 708 (Utah 2015) (internal citations omitted). Plaintiff asserts that Defendants negligently interfered with the marital relationship of Plaintiff

and Spouse. (R. 24.) Yet, Plaintiff cites no legal authority supporting such a cause of action in his Complaint or Brief. The only source of authority to which he points to support this claim is *Webb v. Univ. of Utah*, 2005 UT 80, (Appellant's Brief, p. 3). *Webb* does not support Plaintiff's cause of action for negligent interference with a marital relationship. It merely supports a claim for negligence. Plaintiff claims his injuries to be contention, discord, dissatisfaction in his marital relationship with Spouse culminating in the dissolution of the marriage, and severe emotional distress. (R. 24.). Damages can only be collected for these injuries under Utah law under an action for alienation of affection, intentional infliction of extreme emotional distress, and/or negligent infliction of emotional distress. Each of these claims has its own requisite elements. No claim exists for negligent interference with the marital relationship under Utah law. Therefore, the district court's judgment dismissing the Complaint for failing to state a claim for negligence should be affirmed.

## V. The District Court Correctly Dismissed Plaintiff's Claim for Intentional Infliction of Emotional Distress.

To state a claim for intentional infliction of emotional distress, Plaintiff must sufficiently plead facts that defendant:

> intentionally engaged in some conduct toward the plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) where any reasonable person would have known that such would result; *and* his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

*Cabaness v. Thomas,* 2010 UT 23 ¶ 36, 232 P.3d 486 (*quoting Bennett v. Jones, Waldo Holbrook, & McDonough*, 2003 UT 9, ¶ 58, 70 P.3d 17).

> To be considered outrageous, the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair. Conduct is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it would give rise to punitive damages, or because it is illegal. The liability for intentional infliction of emotional distress clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

*Bennett v. Jones, Waldo, Holbrook, &* McDonough, 2003 UT 9, ¶ 64 70 P.3d 17 (internal citation and quotations omitted).

> Courts have been hesitant to allowing recovery in claims for intentional infliction of emotional distress, because of the subjective nature of emotional distress. In order to determine whether a complaint raises a valid cause of action, the sufficiency of Plaintiff's compliant, must be determined by facts pleaded rather than conclusions stated.

*Id.,* at ¶ 58-59 (internal citations and quotations omitted).

Plaintiff fails to make the specific claim that the Defendants intentionally engaged in the alleged conduct with the purpose of inflicting emotional distress. At most, Plaintiff claims that Defendants "knew or should have known that through their actions and/or omissions, [Plaintiff] would suffer severe emotional distress." (R. 25.) Without the element of having the purpose to inflict extreme emotional distress, Plaintiff must sufficiently allege facts that any reasonable person would have known that such conduct would result in emotional distress to the victim AND that Defendants' alleged actions are the sort of outrageous conduct necessary to state a claim for intentional infliction of extreme emotional distress.

Plaintiff's factual allegations fall far short of alleging the sort of outrageous or intolerable conduct necessary to state a claim for intentional infliction of extreme emotional distress. Instead of specific factual allegations of statements made by Defendants, Plaintiff makes

conclusory allegations that his former mother-in-law was generally "a very negative and abusive person;" (R. 8.); that she screamed "obscenities and very derogatory statements about [Plaintiff];" (R. 9.) and that she was "not careful about having negative and disparaging conversations about Plaintiff in front of the children." (R. 10.) The only specific verbal statements Plaintiff claims were made by Defendants are that his former mother-in-law called him "such words as[:] bastard, asshole, stupid, a piece of shit, and many other inappropriate names." (R. 14.) These fall squarely into the category of "mere insults." Plaintiff's further allegations include Defendants sending texts to family, friends, and ward members telling them of Plaintiff's extramarital affair, (R. 12.); picking up lunches for the children from multiple restaurants several times per week despite Plaintiff's request that it be stopped, (R. 17).; maintaining one of the children's pictures on Defendants' Google profile despite Plaintiff's request that it be removed, (R. 17.); telling their Bishop that Plaintiff and Spouse were completely broke and they couldn't take care of their own needs, (R. 19.); accusing Plaintiff of stealing $13,000 from the home safe, Compl., (R. 20.); and attempting to have Plaintiff arrested, (R. 21.) Even if taken as true, Plaintiff's allegations do not show that Defendants engaged in conduct towards Plaintiff which was so outrageous or intolerable to support recovery in an action for intentional infliction of emotional distress.

Finally, Plaintiff fails to state any specific form of extreme emotional distress other than general allegations of hurt feelings and a refusal to spend time with his family because he did not want to associate with his in-laws. The emotional distress Plaintiff claims to have suffered is the loss of his wife's affection (although he also fails to claim that there was ever any affection to

lose), general embarrassment, hurt feelings, and a general desire to not associate with Defendants to the extent that he remained in their basement and refused to attend family functions in the upper levels for fear of interacting with Defendants. Yet Plaintiff also claims to have remained in the marital home with Defendants and Spouse during and after his affair with another woman in California and for approximately 6 months after he personally filed and obtained a default decree of divorce, indicating that the emotional distress must not have been bad enough for him to remove himself from the situation even after he ended the marriage. Plaintiff's injuries are no different than the type normally suffered when one remains in a difficult relationship, a relationship fails, and/or when one intentionally remains in the domicile with people who appear to dislike you.

In summary, Plaintiff fails to demonstrate that the Defendants intentionally engaged in conduct with the purpose of causing extreme emotional distress. Plaintiff also fails to demonstrate that Defendants should have known that extreme emotional distress would result from their alleged conduct and that their conduct was so outrageous as to permit recovery. Therefore, the district court's order dismissing Plaintiff's Complaint for failing to state a claim for intentional infliction of emotional distress should be affirmed.

**VI. The District Court Correctly Dismissed Plaintiff's Claim for Negligent Infliction of Emotional Distress.**

To state a claim for negligent infliction of emotional distress, Plaintiff must sufficiently plead facts that an individual (a) should have realized that his conduct involved an unreasonable risk of causing the distress,. . . and (b) from facts known to him, should have realized that the

distress, if it were caused, might result in illness or bodily harm. *Hansen v. Mountain Fuel Supply Co. , 858* P.2d. 970, 970 (Utah 1993). The emotional distress suffered "must be severe; it must be such that "a reasonable [person] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 975 (quoting *Rodrigues v. State*, 52 Haw. 156, 172, 472 P.2d 509, 520 (Hawaii 1970.) In addition, "it is not enough for a plaintiff to merely allege emotional distress. Instead, she must prove that distress by means of severe physical or mental manifestations." *Id.* at 975. Negligent infliction of emotional distress does not provide protection and compensation for much of the emotional distress which we endure. *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 69 (Utah 1998) (*quoting Thing v. La Chusa*, 48 Cal. 3d 644, 666, 771 P.2d 814, 828 (1989).

Plaintiff fails to plead facts other than bare allegations of emotional distress and a fear of interacting with Defendants to the point that he would not come out of the basement. (R. 11.) Plaintiff alleges that while he lived in the basement of Defendants' home, he felt "threatened, uncomfortable, unsafe, unwanted, and even fearful of the next round of disparagement that he . . . would be forced to endure." (R. 11.) He also generally claims feeling alienated, (R. 11, 12, 20, 21.), ignored, (R. 17, 18.), criticized, (R. 19.), and awkward., (R. 19.). Aside from these feelings, Plaintiff alleges no symptoms of severe emotional distress. Neither does Plaintiff allege facts sufficient to establish that the Defendants' conduct constituted negligence of the type likely to cause severe and unmanageable mental distress in a reasonable person normally constituted. *See Moutain Fuel*, 858 P.2d at 975. In addition, Plaintiff alleges that in the midst of this he was still capable of orchestrating an affair with another woman, (R. 2.), of filing for divorce (R. 7.), and

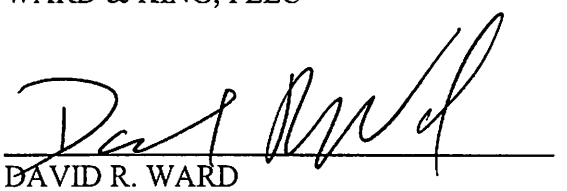
of choosing to remain in the marital home with Defendants after having obtained a default decree of divorce, (R. 10.). These pleaded facts do not rise to the level required by law to provide for a claim of negligent infliction of emotional distress. Therefore, the district court's order dismissing the Complaint for failing to state a claim for negligent infliction of emotional distress should be affirmed.

## CONCLUSION

For the foregoing reasons, the trial court's grant of dismissal for failure to state a claim upon which relief may be granted should be affirmed and Defendants should be awarded their attorneys fees incurred in this action.

Respectfully Submitted the 25th day of August, 2016.

WARD & KING, PLLC



DAVID R. WARD
Attorney for Defendants

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(A) and (C) of the Utah Rules of Appellate Procedure, counsel for the Appellees/Defendants complies with the type-volume limitation. The type faced used herein is Times New Roman and the number of words in this brief is: **5,323**

Dated this 25th day of August, 2016.

WARD & KING, PLLC

DAVID R. WARD
Attorney for Appellees/Defendants

## CERTIFICATE OF MAILING

I hereby certify that on the 25th day of August, 2016, a true and correct copy of the foregoing **BRIEF OF APPELLEES** was sent via first class mail, postage prepaid, to the following persons:

Wesley D. Hutchins
Attorney for Petitioner
6751 South Adventure Way
West Jordan, UT 84081